ALTS
Association for Local Telecommunications Services

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 20, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C.

ORIGINAL

Re: Ex Parte in Docket 96-98 and
CCB/CPD 97-30

Dear Ms. Salas:

Enclosed pleas find two copies of a letter delivered to the Chairman this afternoon that should be included as ex parte communications in the above referenced proceedings.

Should you have any questions, please call me at 969-2585.

Sincerely

Emily M. Williams

Emily M. Williams

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ALTS
Association for Local Telecommunications Services

July 21, 1998

By Hand

The Honorable William E. Kennard
Chairman, Room 814
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Re: Reciprocal Compensation for Transport and Termination of Local Traffic to Internet Service Providers

Dear Chairman Kennard:

On July 1, 1998, Mr. Ed Young and Mr. Tom Tauke of Bell Atlantic wrote to you asking that the Commission "quickly adopt an order in response to the petition filed by ALTS last summer" relating to the application of reciprocal compensation agreements to the transport and termination of calls made within a local calling area to Internet Service Providers ("ISPs"). While ALTS has now withdrawn its request because a substantial number of states have held that such traffic is local and falls within the negotiated and arbitrated reciprocal compensation agreements signed by the ILECs,[1] it is important that the misconceptions contained in the Bell Atlantic letter be corrected. The Commission cannot take action based on the misleading and self-serving statements of the ILECs. Rather, it should allow the states to continue to arbitrate, interpret, and enforce interconnection agreements (which the ILECs have negotiated and signed) in accordance with their section 251 and 252 responsibilities.

The impression clearly intended by Bell Atlantic's letter is that CLECs are exploiting some "loophole" to milk the ILECs out of substantial sums of money. Bell Atlantic argues that the application of negotiated reciprocal compensation agreements to the transport and termination of ISP traffic is somehow an "enormous drain" on incumbent local telephone companies, and somehow distorts the marketplace and incentives for investment.

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[1] Letter from Richard J. Metzger, ALTS, to Kathryn C. Brown, Chief, Common Carrier Bureau, re: CC No. 96098, CCB/CPD 97-30 (July 2, 1998).

First, it was the ILECs and not the CLECs that insisted upon reciprocal compensation rather than "bill and keep" for the transport and termination of local traffic, including local calls to ISPs, and it was the ILECs who insisted upon relatively high transport and termination payments. Indeed, two years ago Mr. Young on behalf of Bell Atlantic defended the adoption of reciprocal compensation against charges that the transport and termination rates might be set too high by pointing out that: "[i]f these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound, such as credit card authorization centers and Internet access providers" (Reply Comments of Bell Atlantic at 21, CC Docket No. 96-98 (filed May 30, 1996)). Having relied upon the CLECs' ability to successfully "market" to "Internet access providers" in obtaining reciprocal compensation from the Commission in the first place, Bell Atlantic is hardly in a position now to beg the FCC to bail it out because the CLECs are doing too good a job of competing. The Commission certainly should not countenance the ILEC behavior of attempting to unilaterally void agreements that they have signed.

The amounts that the ILECs are supposed to pay for reciprocal compensation were negotiated by them in arms length negotiations. If Bell Atlantic perceives that it has negotiated a bad deal, it can raise its concerns as the existing interconnection agreements expire, and are renegotiated under the auspices of the state commissions.[2] Simply put, the answer to the ILEC's "problem" is in the marketplace.

Second, the amount of money discussed by Bell Atlantic is, when put in perspective, not a large sum of money for the ILECs, but a substantial amount of revenue for the CLECs.[3] Bell Atlantic estimates that the "imbalance" for 1998 will be approximately $150 million. This is approximately 0.5% of Bell Atlantic's reported gross revenues of $30 billion for 1997 (and presumably a slightly smaller percentage of their 1998 gross revenues). A review of a sample of CLEC information taken from their 1998

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[2] We also note that the rates currently contained in ILEC and CLEC interconnection agreements for the transport and termination of local traffic are substantially lower than some of the rates that RBOCs have signed with independents like GTE for transport and termination of local traffic.

[3] One of the allegations that Bell Atlantic makes is that if the customer leaves its computer connected to the Internet all the time the reciprocal compensation can total $300 per month. The first answer to this is, again, that this is the deal that was pushed by and negotiated by the ILECs themselves. Furthermore, this calculation is clearly based on a hypothetical Internet user that probably doesn't exist anywhere. A recent Network Reliability Steering Committee study established that the mean Internet holding time is little as 16 minutes and not more than 25 minutes. Many ISPs automatically disconnect a line if there is no activity on it after a given period of time, usually as little as 5 or 10 minutes. Users wanting 24-hour connections are unlikely to obtain switched connections; rather they will obtain dedicated ones.

first quarter 10Q filings submitted to the SEC shows that for the first quarter of 1998, the revenues from reciprocal compensation related to ISP traffic should be as high as 6-8% of gross revenues. Of course, despite the various state proceedings, a number of ILECs continue to refuse to pay these monies.[4]

Furthermore, the issue of unbalanced traffic flows, as recognized in Bell Atlantic's comments cited above, is not unique to ISPs. Although Bell Atlantic and other ILECs complain about the structure of ISP traffic, they raise no complaint about the fact that most wireless calls terminate to a wireline carrier (usually the ILEC), so that the ILECs typically collect more revenue than they pay out for those calls.

Bell Atlantic also argues that reciprocal compensation pays carriers for "doing nothing," and that reciprocal compensation is "risk-free cash" or "free cash". The assertion that reciprocal compensation is "risk free," and that it somehow compensates carriers for doing nothing is absurd, and flatly inconsistent with Bell Atlantic's representations to the Commission in CC Docket 98-96,[5] as well as the Commission's ultimate holding there.[6] Indeed, the CLECs as a group have raised almost $20 billion since the passage of the Telecommunications Act of 1996, a great deal of which has been expended or is being expended for facilities used to transport and terminate either ISP or other traffic. The contention that CLECs do nothing for the money earned pursuant to reciprocal compensation agreements completely disregards the fact that the ILEC is handing off traffic to the CLEC, which transports that traffic over the facilities in which it has invested and then terminates the traffic at the specified location. Bell Atlantic necessarily saves the transport and termination costs that the CLECs incur, while insisting on receiving payment for its comparable network functions.

Bell Atlantic alleges that in some instances Internet service providers have begun setting up shop as "carriers" for the sole purpose of getting paid reciprocal compensation for the Internet traffic that is delivered to them. Bell Atlantic asserts that some of these ISPs provide no dial tone or local telephone service to anyone. While Bell Atlantic

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[4] BellSouth has admitted that it has not paid any monies it owes in reciprocal compensation for traffic to ISPs. See Communications Daily at 3 (July 20, 1998).

[5] In its May 30, 1996, reply comments, Bell Atlantic took great umbrage at the notion that no costs should be associated with transport and termination: "The most blatant example of a plea for a government handout comes from those parties who urge the Commission to adopt a reciprocal compensation price of zero, which they euphemistically refer to as 'bill and keep.' A more appropriate name would be 'bilk and keep' . . ." (id. at 20).

[6] Local Competition Order, ¶ 1112: " . . . we find that carriers incur costs in terminating traffic that are not *de minimis* . . . ." If these costs are ignored and CLECs are unable to continue to provide service to ISPs then ISPs will be left with no competitive alternative to the ILEC.

offers no quantification of this phenomenon, we simply note that if Bell Atlantic or any other ILEC has a complaint that any entity has improperly become certified by a state commission (or has sought and obtained an interconnection agreement that is either fraudulent or unfair) the ILECs can take their complaint to the state commissions as contemplated in the 1996 Act.

Bell Atlantic also argues that reciprocal compensation "pays carriers not to compete" and deters investment. It argues that competing carriers will not sign up residential or other dial-up users for their own local services because that would result in a loss of reciprocal compensation for those calls handled entirely on the competing carriers network.

With all due respect to Bell Atlantic, to the extent that residential competition has developed more slowly than some predicted, this is largely the result of ILEC pricing decisions, persistent opposition to local competition, and operational roadblocks erected by the ILECs. As has been explained to the Commission previously, unnecessary expense and delay in the provision of collocation space, unavailability or improper pricing of unbundled network elements, and malfunctioning or insufficient operational support systems, among other things, is the primary reason for the slower development of residential competition than initially expected by some when the Telecommunications Act of 1996 was signed into law.

In addition, it is very difficult to see how reciprocal compensation has or will deter investment in, and network deployment of, high speed data networks. Virtually every day in the news media there is yet another story about new investment by both CLECs and ILECs in xDSL technologies and services. Any argument that an ISP would stay on a circuit switched network if customers are demanding packet networks is likewise unavailing. Customers are demanding non-switched high speed data access and ISPs are migrating toward those services.

The vehicle by which Bell Atlantic seeks Commission relief would be a ruling that a call to an ISP is inherently interstate and therefore outside the reciprocal compensation agreements that the ILECs and CLECs have signed. However, there are several flaws in Bell Atlantic's legal analysis that call into question the Commission's authority to make such a ruling.

Bell Atlantic urges that the Commission rely on its general authority in the Communications Act of 1934 to regulate interstate traffic, and to rule, pursuant to that authority, that calls to local ISPs are in fact interstate in nature. But under the 1996 Act, the initial review of reciprocal compensation agreements falls under the purview of the states. And every state that has ruled on the issue to date has affirmed that the costs

associated with transport and termination of ISP calls is covered by those agreements.[7] Appeal of those state PUC decisions lies with the federal courts, which, in fact, are considering some of the state PUC decisions, not the FCC. If, in fact, the state PUCs have wrongly interpreted the reciprocal compensation provisions of the contracts, the federal courts, not the FCC, should make that determination.

In any event, calls to ISPs are not necessarily interstate as Bell Atlantic would have it and, even if they were, there is no reason why the Commission would need to displace state jurisdiction over the services even absent Sections 251 and 252 of the Telecommunications Act of 1996. For many years the Commission has held that there are really two services when an end user calls an ISP: (1) the call to the ISP platform, which the Commission has always treated as a call from one end user to another end user subject to state regulation as a telecommunications service, and (2) the information service (which, while it may have a telecommunications input, is not a regulated telecommunications service). When the call to the ISP is within the same exchange as the ISP, the call is necessarily a "local" call. Such calls have been treated as local for the purpose of end user tariffs and separations as long as there have been ISPs.

Although the Commission has always treated an end user call to an ISP as if it were any other local end user to end user call, if the Commission were to prospectively change that analysis and decide that in fact there is "one communication" involved whenever an end user calls an ISP and the ISP then "retransmits" the communication to sources located on the Internet, there is still no precedent that suggests that the Commission, rather than the states, need to adopt rules or rates relating to these services. There are many instances when the Commission has allowed the states to regulate communications that may involve some "interstate" usage, particularly when that interstate usage is not easily separated from the intrastate usage.

As indicated above, the ALTS request to the Commission is no longer formally before it. Therefore, there is absolutely no need for the Commission to make any ruling at this time. And, for the legal and policy reasons cited above, it would be a severe mistake for the Commission on its own to make any pronouncement that would undermine the nineteen states that, in accordance with the 1996 Act, have already ruled on the applicability of the signed reciprocal compensation agreements to this type of traffic. Such action would be particularly in appropriate as this Commission does not

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[7] It would be particularly inappropriate for the Commission to try to "interpret" the interconnection agreements when it does not even have those agreements before it. In addition, in its Local Competition Order the Commission noted that reciprocal compensation obligations apply to traffic that originates and terminates within a local calling area *as defined by a state commission*. 11 FCC Rcd 15499 ¶ 1035.

have the benefit of the evidentiary records that state commission have on which to base their rulings.

Any FCC action along the lines requested by Bell Atlantic would be an attempt to alter current interconnection agreements that were negotiated in good faith and would have a substantial adverse impact on CLECs and competition.

The Commission should not grant the relief requested by Bell Atlantic and should allow the processes of negotiation between carriers with state review contemplated in the Act to proceed.

Thank you for your consideration of this matter. We would appreciate the opportunity to meet with you at any time to discuss this further.

Sincerely,

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